

**LETTER OPINION  
2003-L-51**

November 18, 2003

Mr. Nevin Van de Streek  
Minot City Attorney  
PO Box 1697  
Minot, ND 58702-1697

Dear Mr. Van de Streek:

Thank you for your letter asking whether the city of Minot may pay back-wages owing to the former employees of a now-defunct Minot business without violating Article X, section 18 of the North Dakota Constitution. The business had received economic development aid from Minot's "Magic Fund," but ceased doing business when, according to your letter, its primary client failed to pay for services rendered. You further recite that as a result of that non-payment, the paychecks the Minot business delivered to its employees were returned for insufficient funds. It has been proposed that the city of Minot pay those wages in exchange for an assignment by the employees of their claims against the employer for unpaid wages. You indicate that the assignments would not be an equal exchange because the financial circumstances of the employer indicate the city would recover very little of the unpaid wages.

As you are aware, Article X, section 18 of the North Dakota Constitution restricts a political subdivision from most forms of gift giving:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

The limitations in Article X, section 18 do not apply in three situations: "(1) when the money is used to make internal improvements; (2) when the money is donated for the support of the poor; or (3) when the money is distributed pursuant to an authorized industry, enterprise or business of the [political subdivision]." N.D.A.G. 98-F-30. Your

request letter indicated that you believed only the “support of the poor” and “enterprise” exceptions might apply. I agree with your assessment.

While Article X, section 18 does allow a political subdivision to make donations in support of the poor, this office has previously opined that Article VII, section 2 of the North Dakota Constitution tempers that ability by requiring specific statutory authority before doing so. E.g., N.D.A.G. Letter to Larson (Sept. 25, 1987). Because that statutory authority does not currently exist, a city cannot make a donation in support of the poor. Id.; N.D.A.G. 98-F-30.

The only other way Minot, as a home rule city, could make the donation is “pursuant to an authorized industry, enterprise or business.” N.D.A.G. 98-F-30. Any industry, enterprise or business must be for a public purpose. N.D.A.G. 2003-L-22. In determining whether an expenditure of funds is an unconstitutional donation, the primary question is whether the funds are used for a public or private purpose. Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944); N.D.A.G. 87-2. A public purpose promotes the general welfare of all of a political subdivision’s residents. N.D.A.G. 2003-L-22 (citing Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964)). An incidental private benefit will not render an action unconstitutional, however, if the action itself is primarily for a public purpose. Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944). “On the other hand if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality.” Id.

Accordingly, even if Minot had an appropriate industry, enterprise or business through which it could make donations, those donations must be for a public purpose and cannot result in a chiefly private benefit. While the question of whether the donation of funds serves a public purpose is one of fact to be determined by the city, N.D.A.G. 87-2, it is not likely that a one-time donation to only the former employees of a now-defunct business would qualify as a donation with a public purpose, but would instead convey a chiefly private benefit for the recipients.

You suggest that one possible rationale is that the payments could be “in assistance of economic development.” A city’s interest in its economic development is a public purpose that would support a city’s donation of moneys. See City of Jamestown v. Leever’s Supermarkets, Inc., 552 N.W.2d 365, 369 (N.D. 1996). However, as you note in your request letter, making a connection between a donation of money to the affected employees and economic development<sup>1</sup> is difficult at best. There is no apparent connection between the proposed donation and the encouragement of economic development in Minot. The donation would only be a partial covering of the obligation of a failed economic development project; it would not appear to aid in the growth or

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<sup>1</sup> To develop means to “aid in the growth of . . . to cause to expand or grow . . . [t]o bring into being; make active.” The American Heritage Dictionary 389 (2nd coll. ed. 1991).

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expansion of any business or industry. Accordingly, it is my opinion Minot cannot pay back-wages owing to the former employees of the now-defunct Minot business without violating Article X, section 18 of the North Dakota Constitution.

Sincerely,

Wayne Stenehjem  
Attorney General

sam/vkk